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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RUBEN COLON, Petty Officer First Class,
United States Navy,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a military member may constitutionally be tried and convicted of a capital offense by a "jury" consisting of only five members?

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Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ruben Colon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on March 21, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Colon*, —— M.J. —— (C.M.A. March 21, 1991), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Colon*, No. 88-4988, slip op. (N.M.C.M.R. Oct. 31, 1990), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review on March 21, 1991, and affirmed petitioner's conviction on the same day. Petitioner's con-

viction had previously been affirmed by the United States Navy-Marine Corps Court of Military Review on October 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATUTE INVOLVED

10 U.S.C. § 816 Courts-martial classified

> The three kinds of courts-martial of the armed forces are—
>
> (1) general courts-martial consisting of—
>
> (A) a military judge and not less than five members; . . . .

STATEMENT OF THE CASE

On 14 July 1988, petitioner was found guilty, contrary to his pleas, of felony murder,[1] robbery,[2] and kidnaping.[3] Although the case was referred capital, petitioner was sentenced to life imprisonment, forfeiture of all pay and allowances, reduction to the pay grade of E-1, and a dishonorable discharge. Petitioner was tried and sentenced by a court-martial consisting of only five members.[4]

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[1] 10 U.S.C. § 918(4), Article 118(4) (1982 and Supp. 1984).

[2] 10 U.S.C. § 922, Article 122 (1982 and Supp. 1984).

[3] 10 U.S.C. § 934, Article 134 (1982 and Supp. 1984).

[4] Under the Uniform Code of Military Justice, an accused may be tried by a military judge alone, or by a panel of members, usually officers, chosen by the officer exercising court-martial convening authority. *See* 10 U.S.C. § 825 (1982). However, where a case is referred capital, as in this case, an accused may not elect to be tried by

Appellant's conviction and sentence were affirmed by the Navy-Marine Corps Court of Military Review. *United States v. Colon*, No. 88-4988, slip op. (N.M.C.M.R. Oct. 31, 1990). The United States Court of Military Appeals granted the petition for review and summarily affirmed the lower court's decision. *United States v. Colon*, —— M.J. —— (C.M.A. March 21, 1991).

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT BECAUSE PETITIONER WAS ARBITRARILY DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A JURY CONSISTING OF AT LEAST SIX MEMBERS.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Court has made clear the importance of the right to a jury trial in the American system of criminal justice. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court extensively documented the origins and importance of the right to a jury trial, and concuded that the right is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.*, at 157-158. *Duncan* held that the Sixth Amendment right to a jury trial for non-petty offenses applies to the states through the Fourteenth Amendment.[5]

Ten years after *Duncan*, the Court unanimously held that the Constitution mandated that a minimum of six persons serve on a jury. *Ballew v. Georgia*, 435 U.S. 223 (1978). *Ballew* noted several studies which indicated

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military judge alone. Rules for Courts-Martial 501(a)(1)(B), Manual for Courts-Martial, United States, 1984.

[5] Not only has the Court recognized the importance of a jury trial to an accused, it recently reaffirmed that participation by the citizenry as *jurors* is a legitimate means to serve important societal ends. See *Powers v. Ohio*, —— U.S. ——; 111 S.Ct. 1364 (1991).

that progressively smaller juries are less likely to foster effective group deliberation, and that the risk of convicting an innocent person increases as the size of a jury diminishes. The Court also noted the adverse impact on minority representation as jury size decreases. The Court concluded that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id.* at 239.

Despite the universally recognized importance of the right to a jury trial, and the Court's clear guidelines regarding the number of jurors required by the Sixth Amendment, millions of Americans are systematically deprived of this right. In clear violation of the principles of *Ballew*, Article 16 of the Uniform Code of Military Justice [6] requires only that a general court-martial consist of "a military judge and not less that five members." The number of members in a general court-martial typically ranges from five to ten, depending completely on the whim of the accused's commander. This state of affairs continues to exist, despite the fact that this Court has never squarely held that the Sixth Amendment right to a jury trial does not apply to the military. Petitioner was convicted by a court consisting of only five members.

The continued deprivation of the right to a jury trial in the military is based on a line of dicta, emanating from *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, the Court indicated that the Sixth Amendment right to a jury trial does not apply to the military by implication because the Fifth Amendment expressly excepted the military from the grand jury requirement. The Court stated:

> The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases;

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[6] 10 U.S.C. § 816.

> but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth.

Id. at 123.

Petitioner acknowledges that this interpretation of the Fifth and Sixth Amendments has been reaffirmed by this Court, without further scrutiny, on several occasions since *Milligan*. *See Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Welchel v. McDonald*, 340 U.S. 122 (1950); *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969). Military courts have also adhered to this interpretation. See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); *United States v. Jenkins*, 20 U.S.C.M.A. 112, 42 C.M.R. 304 (1970); *United States v. Rice*, 3 M.J. 1094 (N.C.M.R. 1977).

Despite these reiterations of the *Milligan* dicta, this Court, and the military courts have continued to require specific military justification before depriving military personnel of the same rights afforded civilian citizens. For example, in *Burns v. Wilson*, 346 U.S. 137 (1953), the Court stated that "military courts, like the state courts, have the same responsibilities as do federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. In *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976), the Court of Military Appeals, holding the Fifth Amendment due process clause applicable to the military, decided that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Id.* at 270.

Given the dubious genesis of the rule excepting military personnel from the Sixth Amendment right to a

jury trial, petitioner requests that this Court re-examine the applicability of cases which deprive service members of the right to a jury trial, irrespective of the offense or the circumstances of its commission. Petitioner believes that two reasons compel this scrutiny: 1) the expanded jurisdiction of military courts-martial in light of this Court's holding in *Solorio v. United States*, 483 U.S. 435 (1987), and (2) the lack of any modern justification or military necessity for the deprivation of the fundamental right to a jury trial, particularly for offenses committed in peacetime.

In *O'Callahan v. Parker*, this Court held that for an offense to be triable in a military court-martial, the offense must be "service connected" in some way. In so limiting the jurisdiction of courts-martial, the Court recognized that courts-martial lack the protections normally afforded defendants in civilian courts, including the right to a jury trial:

> We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.

Id. at 272-73.

The Court dramatically expanded court-martial jurisdiction when *Solorio v. United States* overruled the service connection requirement of *O'Callahan*. As the law stands today, court-martial jurisdiction depends solely on whether the accused is a member of the military. A court-martial may try any offense, whether military or civilian in nature, whether committed in time of peace or conflict, and despite the availability of civilian courts with jurisdiction to try the case.

The Court should note that military jurisdiction not only extends to active duty personnel, but to millions of reservists and retired personnel as well. *See* 10 U.S.C.

§ 802. Military courts have exercised this jurisdiction regularly and have interpreted the jurisdictional statute expansively. *See Murphy v. Garrett*, 29 M.J. 469 (C.M.A. 1990) (Marine Corps permitted to exercise court-martial jurisdiction over reservist for offense which occurred when he served as a regular officer); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990) (court-martial jurisdiction extended to retired chief petty officer working for Navy as a civilian employee and accused, *inter alia*, of violating orders).

Given the ubiquitous application of court-martial jurisdiction, it is more important than ever that the Court determine whether the Sixth Amendment right to a jury trial should apply to certain types of courts-martial. Service members are routinely tried for common law offenses, with absolutely no service connection, and are systematically deprived of the rights enjoyed by their civilian counterparts simply by virtue of the person's status as a military member.

The famous *Milligan* dictum was based in part on the theory that the "discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by common law courts." *Milligan* at 123. While a jury trial may have posed logistical difficulties when the Constitution was drafted and during the Civil War, there is no military justification for the continued deprivation of the right to a jury trial in modern times.[7] It strains credulity to suggest that conforming with the jury size requirements of *Ballew* would pose any significant burden on today's military with its extensive communication and transportation facilities, especially during peacetime. Conforming with *Ballew*

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[7] The Articles of War enacted May 31, 1786 recognized that small detachments of United States forces may be insufficient to hold a general court-martial, but nevertheless stated that "[g]eneral courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they shall not consist of less than 13 where that number can be convened without manifest injury to the service." Winthrop, *Military Law and Precedent* 972 (2d ed. 1920).

would merely entail the detailing of one additional member to general courts-martial.[8]

CONCLUSION

Currently, the military is the only jurisdiction in the United States where an accused is not entitled to trial by at least a six member jury. The Court has never ruled directly on this important issue. Currently, an accused facing the death penalty must rely on the whim of his commanding officer as to whether the number of jurors meets constitutional muster. Given the Court's expansion of military jurisdiction in *Solorio* and the lack of any military justification for the continued deprivation of the fundamental right to a jury trial, the Court should grant this petition and re-examine the continued validity of the statute depriving miliary citizens of the Sixth Amendment right to a jury trial in general courts-martial.

Respectfully submitted,

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[8] The application of *Ballew* to courts-martial would not affect special courts-martial, which require a minimum of only three members, because the maximum penalty at a special court-martial is six months confinement. See *Baldwin v. New York*, 399 U.S. 66 (1970) (right to a jury trial does not extend to petty offenses; no offense can be deemed petty where punishment may exceed imprisonment for six months).

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 65729/NA
CMR Dkt. No. 88-4988

UNITED STATES,
Appellee

v.

RUBEN COLON (093-46-2995),
Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review, it is by the Court this 21st day of March, 1991

ORDERED:

That said petition is hereby granted on the issues raised by appellate defense counsel; and

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (FASANARO, Esq.)
Appellate Government Counsel (FAVORS)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before E. M. BYRNE, KENT A. WILLEVER, R. A. STRICKLAND.

UNITED STATES

v.

RUBEN COLON, 093 46 2995
Electronics Warfare Technician
First Class (E-6), U. S. Navy

NMCM 88 4988 Decided 31 October 1990

Sentence adjudged 14 July 1988. Military Judge: John A. Studer. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Helicopter Wings, Atlantic, Box 102, Naval Air Station, Jacksonville, FL 32212-0102.

LT THOMAS E. MIRO, JAGC, USNR, Appellate Defense Counsel

LCDR SUSAN K. MILLIKEN, JAGC, USN, Appellate Defense Counsel

LT STEPHEN PONTICIELLO, JAGC, USNR, Appellate Government Counsel

MICHAEL F. FASANARO, Jr., Esquire, Civilian Defense Counsel

STRICKLAND, Judge:

Appellant was tried by general court-martial composed of officer members. Contrary to his pleas, he was convicted of unpremeditated murder, murder while committing robbery, robbery, and kidnapping in violation of Articles 118, 122 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918, 922 and 934, respectively.[1] Although the murder charge was referred as a capital offense, and appellant was found guilty of murder while committing robbery, by unanimous vote, he was sentenced to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1 and a dishonorable discharge. The convening authority approved the sentence as adjudged.

Appellant raises ten assignments of error on appeal.[2] We find all assignments of error to be without merit and affirm.

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[1] Appellant was charged with a single specification under Article 118, UCMJ, which alleged both premeditated murder and murder during the commission of a robbery. In order to facilitate instructions to the members and their findings, the military judge directed the findings work sheet be redrafted to indicate two separate specifications of Article 118. Following findings, the military judge held these two specifications merged into the single offense of felony murder and further held that all offenses of which appellant was found guilty were multiplicious for sentencing.

[2] I. EVIDENCE OBTAINED FROM SAFE DEPOSIT BOX 23, AMERICAN NATIONAL BANK WAS IMPROPERLY ADMITTED BECAUSE THERE WAS NO PROBABLE CAUSE TO ISSUE A WARRANT.

A. THERE WAS NO PROBABLE CAUSE TO BELIEVE EVIDENCE OF A CRIME WOULD BE FOUND IN BOX 23, AMERICAN NATIONAL BANK BECAUSE THE GOVERNMENT NEITHER POSSESSED NOR PRESENTED INFORMATION TO THE MAGISTRATE THAT SHOWED A NEXUS BETWEEN THE EVIDENCE SOUGHT AND THE PLACE TO BE SEARCHED.

[Continued]

I

Lieutenant Junior Grade (LTJG) Ratish Prasad was the disbursing officer on board the USS JOHN HANCOCK (DD-981). On the morning of 15 March 1988,

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[2] [Continued]

B. THE AFFIDAVIT PRESENTED TO THE MAGISTRATE IN SUPPORT OF THE WARRANTS LACKED A SHOWING OF PROBABLE CAUSE AND CONTAINED ONLY INNUENDO, MISINFORMATION, AND UNFOUNDED BAD-FAITH CONCLUSIONS, WHICH WERE CALCULATED TO MISLEAD.

C. THE INFORMATION CONTAINED IN THE AFFIDAVIT WAS STALE AND COULD NOT SUPPORT A FINDING OF PROBABLE CAUSE.

II. ARTICLE 118 OF THE UNIFORM CODE OF MILITARY JUSTICE VIOLATES THE DUE PROCESS GUARANTIES OF THE FIFTH AMENDMENT BY REQUIRING AN AUTOMATIC SENTENCE TO EITHER DEATH OR IMPRISONMENT FOR LIFE.

III. THE TRIAL JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION (APPELLATE EXHIBIT XII) TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT AS THERE WAS A LACK OF PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT COUPLED WITH HIS RULING WHICH IN ESSENCE STRUCK A VITAL PORTION OF THE EVIDENCE SET FORTH IN THE AFFIDAVIT.

IV. THE TRIAL JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION (APPELLATE EXHIBIT XIII) TO SUPPRESS ILLEGALLY SEIZED EVIDENCE.

V. THE TRIAL JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION (APPELLATE EXHIBIT XIV) TO SUPPRESS ILLEGALLY SEIZED EVIDENCE.

VI. APPELLANT WAS PREJUDICED BY THE ADMISSION OF IRRELEVANT AND INFLAMMATORY MATERIAL CONTAINED IN A SURVEILLANCE VIDEOTAPE RECORDED BY THE NAVAL INVESTIGATIVE SERVICE.

[Continued]

LTJG Prasad was missing from officer's call. His absence was noticed, but it was not considered unusual since it was payday and the disbursing officer routinely prepared for this event in his office. Later, however, when LTJG Prasad could still not be located, it was discovered that one of the safes in the disbursing office was unlocked and open. Missing from the safe was $94,629.00 in U.S. currency; 2,575 blank, consecutively numbered U.S. Treasury checks with the pre-printed name "USS JOHN HANCOCK" on them; and a Treasury check made payable to a crew member in the amount of $419.00. A search of the ship led to the discovery of LTJG Prasad's body in the seabag locker located in the forward part of the ship. He had been bound, gagged, strangled and, ultimately, shot through the head with a .38 caliber weapon.

An intense investigation by the Naval Investigative Service (NIS), assisted by the Federal Bureau of Investigation (FBI), ensued. As few as 20 and as many as 40 NIS agents participated and were under the overall su-

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[2] [Continued]

VII. THE MILITARY JUDGE ERRED BY IMPROPERLY DIVIDING THE SPECIFICATION OF CHARGE I INTO TWO SPECIFICATIONS.

VIII. THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OBTAINED FROM A SEARCH OF APPELLANT'S RESIDENCE WHEN THE ONLY SOURCE OF APPELLANT'S ADDRESS THE ACCUSED'S STATEMENT MADE TO THE NIS WITHOUT PROPER RIGHTS WARNING AND WHICH WAS SUPPRESSED AT TRIAL.

IX. THE EVIDENCE FAILED TO PROVE APPELLANT'S GUILT TO THE CHARGE OF ROBBERY BEYOND A REASONABLE DOUBT.

X. APPELLANT WAS PREJUDICED BY THE MILITARY JUDGE'S CONFUSING AND CONVOLUTED INSTRUCTIONS TO THE MEMBERS CONCERNING RECONSIDERATION.

pervision of Special Agent Fox.[3] All crew members of the ship were interviewed. LTJG Prasad was a part of the duty section for the evening of 14-15 March, and was last seen alive at approximately 0015, 15 March, therefore, the interviews concentrated on persons coming on and going off the ship during the very early morning hours of 15 March.

Chief Radioman Knoll stood the Quarterdeck watch from 0400 to 0800 on the morning of 15 March, and was thus in a position to observe individuals boarding and leaving the ship. Knoll was interviewed by NIS agents on three occasions. During the first interview on 15 March, Knoll stated that he had seen appellant depart the ship between 0615 and 0620. While he made no specific reference to whether appellant carried any bag off the ship, he implied that he had checked all baggage coming on and off the ship. On 23 March, Knoll was interviewed by a different NIS agent and stated that he had observed four civilians, appellant and another crew member depart the ship. He indicated that appellant had carried a large green bag off the ship and the agent understood Knoll to say that he had searched this bag.[4] The third interview was initiated by Chief Knoll on 28 March after attending a department head meeting. During this meeting it was revealed that appellant, who had nearly 15 years of active service, had submitted a request for an early separation from the Navy when it had been anticipated that he would reenlist and complete the 20 years necessary for retirement.[5] Despite these earlier

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[3] Special Agent Fox was assigned as the "Case Agent" and, as such, was responsible for overall coordination of the investigation and the efforts of all investigators assigned to the case.

[4] At trial Chief Knoll professed no recollection of these two interviews and maintained that he first remembered appellant leaving the ship on 28 March.

[5] Appellant was in the process of changing rates from an Electronics Warfare Technician to a Navy Counselor. He had under-

interviews with NIS, which at the time of trial Chief Knoll did not recall, this information keyed the memory of Knoll and he related to NIS that he specifically remembered that the appellant had left the ship on the morning of the 15th. He stated that appellant left at approximately 0500 and was carrying a green cloth bag. He did not believe that the bag was checked and he recalled appellant returning to the ship about 45 minutes later empty handed.

Further investigation revealed that appellant had requested leave on 14 March and had taken leave from 18 to 28 March. There were several inconsistencies with respect to this leave, including an erroneous leave address and an inaccurate representation as to where appellant had actually gone on leave. Appellant, who had indicated in initial interviews that he had not left the ship on 15 March, except possibly to dispose of trash, denied culpability in a 29 March interview. On 8 April, NIS received information from the security manager of the American National Bank that appellant had rented a safe deposit box at one of the bank's branches. A bank official became suspicious because appellant, who identified himself as a crew member of the HANCOCK, appeared nervous and worried, looked around frequently, asked for the largest box available, and asked if Government agents could obtain access to the box.

Appellant was placed under surveillance by the NIS and the FBI the following day. Appellant was observed entering and leaving two other banks and ultimately arrived at the American National Bank. He exited his vehicle and removed a blue cloth bag which appeared to have something in it and entered the bank. When appellant exited the bank he was empty handed. Bank personnel indicated that appellant had gained access to the safe deposit box he had rented the previous day. Chief

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gone "on the job" training as a career counselor and was awaiting a formal school to properly complete the change in rate.

Knoll was shown surveillance tapes on 12 April and indicated the bag appellant carried into the bank resembled the one he had seen appellant carry off the ship. Inquiry of bank personnel on 11 and 12 April revealed that appellant had not accessed the safe deposit box since 9 April.

On 12 April, Special Agent Fox executed an affidavit and appeared before a United States Magistrate for the Middle District of Florida seeking a search warrant of appellant's safe deposit box at American National Bank. Based on the affidavit, the magistrate issued a search warrant. The search warrant was executed the same day and resulted in the recovery of $87,250.00 in U.S. currency, 2,575 blank U.S. Treasury checks imprinted with the name "USS JOHN HANCOCK," a check payable to a HANCOCK crew member in the amount of $419.00 and a Mosler safe deposit box. Appellant was thereafter apprehended and a consent search of his apartment (authorized by appellant's live-in girl friend) was conducted producing several more items of evidentiary value.

II

Four of appellant's assignments of error (I, III, IV and V) attack, on numerous theories, the validity of the search warrant for the safe deposit box. Each theory will be discussed separately.

A.

Appellant asserts that there was no probable cause to believe evidence would be found in the safe deposit box because the information contained in the affidavit failed to show a nexus between the evidence sought and the place to be searched. He maintains this on the basis that the evidence sought had to have been removed from the HANCOCK; there were no restrictions on persons leaving the ship the morning of the 15th or thereafter; no records were kept of persons leaving the ship, thus

causing authorities to rely on the memory of watchstanders; and persons other than appellant were seen leaving the ship carrying articles capable of concealing the evidence. Therefore, appellant reasons that anyone who had been on board the ship at the time of the crime could have removed the evidence and would be subject to a search, thus resulting in a "fishing-expedition."

"Probable cause to search exists when there is a reasonable belief that the . . . evidence sought is located in the place . . . to be searched." Military Rules of Evidence (Mil.R.Evid.) 315(f)(2). "[T]he traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (citing *Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697, 708 (1960)).

We believe that the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing in this case and that, far from a "fishing-expedition" with respect to anyone aboard the HANCOCK, all information focused specifically on appellant as the perpetrator of these offenses. The fact that these offenses occurred between approximately 0215 and 0315 on 15 March (based on testimony of the medical examiner), narrows the field of persons potentially responsible to those on board at the time. Since the ship was in port and normal liberty had been granted, a majority of crew members were not on board. The field is narrowed further, although not conclusively so, to those seen leaving the ship prior to the discovery of LTJG Prasad's body. Even further attention focuses on individuals leaving who carried articles capable of containing the fruits of the crime. Appellant and one other crew member were observed carrying articles off the ship. Although appel-

lant points out that this other crew member carried a briefcase, it is unlikely that this briefcase could have contained all of the money and checks which ultimately filled a 10 x 10 x 21-inch safe deposit box.[6] Appellant's unexpected and unexplained decision to leave the Navy only 5 years before becoming retirement eligible with no apparent job plans, further highlighted appellant. Perhaps the most damning revelation, however, and the one which directed sole attention to appellant, was the manner in which he rented the safe deposit box at American National Bank and his concern over whether Government agents could access the box. This coupled with the surveillance tape, indicating the bag carried into the bank resembled the one appellant carried off the ship, finally narrowed the field to one person, the appellant. We believe these factors established a "nexus" in this instance and provided a substantial basis for the magistrate to conclude that the fruits of this crime would be discovered in appellant's safe deposit box.

B.

In three separate assignments of error, appellant attacks the sufficiency of the affidavit presented to the Federal Magistrate. He assails it for containing misinformation calculated to mislead and for containing numerous factual inaccuracies and omissions which he asserts results in a failure of the affidavit to support a finding of probable cause. Specifically, he contends that the accounts of the interviews with Chief Knoll are "twisted and incomplete" in that they failed to relate the inconsistencies among the interviews with respect to the color of the bag appellant carried, whether it was searched and whether appellant was even observed leaving the ship. Appellant also points to an alleged poor reputa-

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[6] It is also significant to note that this crew member, as well as several others who had been considered as potential suspects, were "non-deceptive" on a polygraph examinations administered by NIS as of 6 April 1988.

tion of Chief Knoll as a watchstander which was not revealed to the magistrate. Appellant further contends that inaccuracies in the affidavit as to the date of death (14 vice 15 March), the date appellant was observed carrying the bag off the ship (18 vice 15 March), the color of the bag (dark vice green or blue) and the total amount of currency and checks missing are such that they do not support a finding of probable cause.

In order to attack the veracity of an affidavit for a search warrant, the United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), held that the defense must make a showing that the affiant made a false statement knowingly and intentionally, or with reckless disregard for the truth. This ruling has been incorporated into Mil.R.Evid. 311(g)(2). S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 201 (2d ed. 1986). The defense has the burden to make such a showing by a preponderance of the evidence before the burden shifts to the prosecution to establish by a preponderance of the evidence that the affidavit still establishes probable cause without the false statements. Mil.R.Evid. 311(g)(2).

In this case, the defense failed to demonstrate that the inconsistencies among Chief Knoll's statements were omitted knowingly and intentionally. In fact, the affiant, Special Agent Fox, testified that he was not even aware of the earlier statements given by Knoll until sometime after the search and apprehension had occurred and that he believed the information provided in the affidavit was correct. The only question remaining is whether the affiant evidenced a reckless disregard for the truth in swearing to the information in the affidavit. We believe he did not. As many as 40 agents were involved in the case and Special Agent Fox had not had time to review all of the voluminous reports by the time the tip was received from the bank. In fact, he testified it took him three weeks to read these materials and compile a final

report after appellant's apprehension. At most one might argue that Fox could have been more efficient in coordinating the investigation; however, his degree of efficiency and his potential disregard for the truth are completely unrelated. We find no evidence that the affiant possessed a reckless disregard for the truth of the information contained in the affidavit.

With respect to Chief Knoll's reputation as a watchstander, any criticism seems to have been associated with the fact that he occasionally strayed away from his post on quarterdeck. There are no allegations concerning deficiencies in his character for truthfulness or any other matter which might affect his reliability in providing information. We find no relevance between the asserted reputation for watchstanding and his reliability to truthfully relate his observations. We consider Chief Knoll to be akin to a "citizen informant" who is presumed to be reliable, *see United States v. Melvin*, 596 F.2d 492 (1st Cir. 1979), *cert. denied*, 444 U.S. 837 (1979), and find no evidence in the record to rebut this presumption.

Finally, turning to the inaccuracies in the affidavit, we are guided by the following principles. Affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, 689 (1965). A magistrate's "determination of probable cause should be paid great deference by reviewing courts," *Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 591, 21 L.Ed.2d 637, 645 (1969), and these "courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Ventresca* at 109, 85 S.Ct. at 746, 13 L.Ed.2d at 689. The standard to be applied in determining probable cause for issuance of a search war-

rant is the "totality of the circumstances." *See Gates, supra. See also United States v. Queen*, 26 M.J. 136 (C.M.A. 1988) (recognizing "totality of the circumstances test" in the military).

The affiant characterized the inaccuracies in the affidavit as typographical errors. He testified that he was in a rush to present the affidavit to the magistrate so the warrant could be executed and served prior to the bank closing for the day. The most significant testimony, however, came from the issuing magistrate. He indicated that it was of no concern to him that the early morning hours of 15 March were portrayed as 14 March since this is a common mistake. It also was of no concern to him that the affidavit alleged appellant left the ship carrying a bag on 18, vice 15, March, just as long as it chronologically followed the offenses. He stated the color of the bag was insignificant. In essence he testified that these inconsistencies would have had no bearing on his issuance of the warrant. We agree. Under the totality of circumstances in this case, giving due deference to the magistrate's decision, we find that the magistrate was correct in determining the existence of probable cause and authorizing the search in question.

C.

Appellant asserts that a U.S. Treasury check in the amount of $419.00, payable to an officer on board HANCOCK, was improperly seized since it was not among the property specified in the search warrant. This assertion is without merit. There is no dispute that the check was one of the items listed as missing from the disbursing office safe. Its seizure was proper since, during the course of properly executing the search warrant, it was discovered in plain view. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In addition, it is not necessary that its discovery be inadvertent. *See Horton v California*, —— U.S. ——, No. 88-7164 (June 4, 1990).

II

In assignment of error VIII, appellant asserts that evidence seized during the consent search of his apartment was improperly admitted because the sole source of his address was a statement he gave which was later suppressed. The evidence complained of was a rope and business card. An expert testified this rope had the same fiber content as that found around LTJG Prasad's neck. The business card led to a discovery that appellant had purchased a .38 caliber pistol and ammunition from a local gun shop. An expert testified that the weapon was one of several types that could have fired the fatal shot and the ammunition was similar in characteristics to the spent round recovered in the seabag locker where the victim's body was found.

We find that the address of appellant's apartment would have been inevitably discovered had he not divulged this information in the suppressed statement. *See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). Accordingly, the items were properly seized and admitted in evidence at trial.[7] We find the remaining assignment of error to be without merit.

III

We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We are convinced of appellant's guilt of all of the charges and specifications beyond a reasonable doubt and find the sentence to be appropriate. Article 66(c), UCMJ. Accordingly, the findings and sentence, as approved on review below, are affirmed.

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[7] We note that even without this evidence the remaining evidence was still overwhelming as to appellant's guilt.

R. A. STRICKLAND

Chief Judge BYRNE and Judge WILLEVER concur.

(See Note Below)*

E. M. BYRNE

KENT A. WILLEVER

* Chief Judge Bryne participated in this case and concurred before beginning his terminal leave prior to retirement.

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No. 90-1930

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In the Supreme Court of the United States

OCTOBER TERM, 1991

RUBEN COLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 16(1)(A) of the Uniform Code of Military Justice, 10 U.S.C. 816(1)(A), violates the Constitution by permitting a military defendant to be tried by a court-martial panel containing as few as five members.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1930

RUBEN COLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals, Pet. App. 1a, affirming petitioner's conviction is reported at 32 M.J. 474. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 2a-15a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 21, 1991. The petition for a writ of certiorari was filed on June 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was tried by a general court-martial at the Naval Station in Mayport, Florida. He was convicted of murder, robbery, and kidnapping, in violation of Articles 118, 122, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 922, and 934. The court-martial sentenced petitioner to confinement for life, a dishonorable discharge, total forfeiture of pay, and reduction to the lowest enlisted pay grade. The convening authority approved the findings and sentence.[1] The Navy-Marine Corps Court of Military Review affirmed on mandatory review. The Court of Military Appeals granted discretionary review and summarily affirmed.

1. On the morning of March 15, 1988, a payday for the crew of the destroyer *USS John Hancock*, Lieutenant Ratish Prasad, the ship's disbursing officer, was missing, and one of the safes in the disbursing office was found unlocked and open.[2] Missing

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[1] A convening authority is a commander authorized to convene courts-martial under Articles 22-24, UCMJ, 10 U.S.C. 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984* (*Manual*). The duties of the convening authority include selection and appointment of prospective court-martial panel members (commonly known as "detailing" the members); determination and direction that the accused be brought to trial by the court-martial for the charged offenses (commonly known as "referral" of the charges); and post-trial review of the proceedings to approve the sentence or to grant clemency (commonly known as "action" on the case). See Arts. 25, 34, 60, UCMJ, 10 U.S.C. 825, 834, 860. See also Rules for Courts-Martial 503, 601, 1107.

[2] A disbursing officer is responsible for pay and finances.

from the safe were $94,629 in U.S. currency, 2,575 blank and consecutively numbered U.S. Treasury checks pre-printed with the name *USS John Hancock*, and a U.S. Treasury check payable to a crew member in the amount of $419. A search of the ship led to the discovery of Lieutenant Prasad's body in a seabag locker in the forward part of the ship. He had been bound, gagged, strangled, and shot through the head. Pet. App. 4a-5a.

Suspicion focused on petitioner for several reasons: He was seen leaving the ship carrying a large bag early on the morning of the murder; he unexpectedly requested early separation from the Navy after 15 years of service; he gave erroneous information about his whereabouts at and after the time of the murder; and he rented a safe deposit box under suspicious circumstances that caused a bank official to report the matter. Pet. App. 6a-7a. Petitioner was ultimately convicted of the murder of Lieutenant Prasad.[3]

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[3] The government's primary evidence at trial was obtained as the result of a search of petitioner's apartment, pursuant to his consent, and from a search of petitioner's safe deposit box, pursuant to a warrant issued by a United States Magistrate based upon information derived from police surveillance of petitioner. In petitioner's safe deposit box, the investigating agents found the currency and checks listed in the text; in petitioner's apartment, the agents found a rope and a business card. An expert testified at trial that the rope had the same fiber content as the rope found around Lieutenant Prasad's neck. The business card led to a discovery that petitioner had purchased a .38 caliber pistol and ammunition from a local gun shop. An expert testified at trial that the weapon could have fired the fatal shot, and that the ammunition was similar to the spent bullet found near the victim's body. Pet. App. 8a-14a.

2. a. Pursuant to its authority under Art. I, § 8, Cl. 14, of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Congress has enacted the Uniform Code of Military Justice, which governs the size, selection process, composition, and voting procedures of courts-martial. Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), provides that general courts-martial shall consist of at least five members, although any greater number is permissible. Article 25(d)(2) of the Code, 10 U.S.C. 825(d)(2), directs the court-martial convening authority to select for the court-martial panel "such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[4] Article 25(c)(1) of the Code, 10 U.S.C. 825(c)(1), allows an enlisted defendant to insist that at least one-third of the court-martial panel be made up of enlisted personnel equal to or senior in rank to the defendant and from a different military unit, unless physical conditions or military exigencies prevent such persons from being assigned to a court-martial panel.

b. In this case, the convening authority detailed 13 prospective panel members to petitioner's court-martial. Tr. 210, 257, 293.[5] The government chal-

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[4] Before the court-martial panel is assembled, the convening authority is free to add, delete, or substitute panel members. Arts. 25, 29, UCMJ, 10 U.S.C. 825, 829.

[5] Seven members were detailed initially. Tr. 210-211. When three of the seven initial members were excused, four additional servicemembers were detailed. Tr. 256-257. Following challenges to those four members, two additional servicemembers were detailed. Tr. 290-293. After one of those members

lenged three prospective members for cause: two because they would be unable to give meaningful consideration to imposition of the death penalty, Tr. 290-291, and one because he had already formed an opinion that petitioner was guilty based upon newspaper accounts of the crime, Tr. 307, 313. The defense challenged one prospective member for cause because of his extensive exposure to media reports of the facts of the crime. Tr. 253, 256. The government peremptorily challenged two prospective panel members. Tr. 256, 292. The defense also struck two prospective panel members, Tr. 256, 292.[6] Upon completion of all the challenges, a quorum of five panel members remained. They were empaneled without objection by the defense. Tr. 313-314.

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was challenged, a quorum of five members remained. Tr. 313-314.

All the panel members were officers. Tr. 210, 257, 293. Petitioner did not request that the court-martial membership be comprised of at least one-third enlisted persons, as was his right under Article 25(c)(1), UCMJ, 10 U.S.C. 825(c)(1).

[6] The government and defense are each entitled to one peremptory challenge as a matter of right. Art. 41, UCMJ, 10 U.S.C. 841. Military trial judges, however, have the discretion to grant each side an additional peremptory challenge if the convening authority adds new members to the court-martial panel. *United States* v. *Carter*, 25 M.J. 471, 476 (C.M.A. 1988). In this case, each side was granted two additional peremptory challenges because the convening authority added new members on two occasions, when the number of prospective panel members fell below the quorum of five required by Article 16, UCMJ, 10 U.S.C. 816, due to the exercise of challenges by both sides. Tr. 256-257, 292-293.

ARGUMENT

In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), this Court held that the Sixth and Fourteenth Amendments require that at least six persons serve on the jury in serious state criminal cases. Relying on *Ballew*, petitioner argues that his conviction by a five-member court-martial panel violates the Due Process Clause of the Fifth Amendment. That claim does not warrant review by this Court.[7]

1. Petitioner did not properly preserve his claim, for several reasons. Petitioner did not object before or at trial to having only five members serve on the court-martial panel in his case, nor did petitioner move to have more than five members empaneled. Accordingly, petitioner has waived his claim. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984 (Manual)* (requiring defendant to raise nonjurisdictional claims on pain of waiver). Moreover, petitioner did not raise his claim on appeal either in the court of military review or in the Court of Military Appeals. See Supp. to Pet. for Grant of Review 2-3 (Dec. 19, 1990) (questions presented to Court of Military Appeals); Pet. App. 3a-5a n.2 (questions presented to the court of military review). Under these circumstances, petitioner has not preserved his claim for review in this Court.

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[7] This Court has previously denied certiorari in several other cases presenting the identical or substantially the same question. *Viola* v. *United States*, cert. denied, 490 U.S. 1020 (1989); *Hargrove* v. *United States*, cert. denied, 488 U.S. 826 (1988); *Johnson* v. *United States*, cert. denied, 488 U.S. 823 (1988); *Mason* v. *United States*, cert. denied, 484 U.S. 912 (1987); *Delacruz* v. *United States*, cert. denied, 481 U.S. 1052 (1987); *Dodson* v. *United States*, cert. denied, 479 U.S. 1006 (1986); *Garwood* v. *United States*, cert. denied, 474 U.S. 1005 (1985); *Hutchinson* v. *United States*, cert. denied, 469 U.S. 981 (1984).

See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[8]

2. There is no conflict among the circuits on the question presented by petitioner. The military courts have consistently rejected the claim that the court-martial system established by Congress is invalid under *Ballew* v. *Georgia*, *supra*, on the ground that a servicemember may be convicted by a court-martial panel that has fewer than 12 members. *E.g.*, *United States* v. *Mason*, 24 M.J. 127, 128 & n.* (C.M.A.), cert. denied, 484 U.S. 912 (1987); *United States* v *Hutchinson*, 17 M.J. 156, 156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (the Sixth Amendment cross-section requirement is inapplicable to court-

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[8] The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1) and 28 U.S.C. 1259(3), restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." Article 67(d), UCMJ, 10 U.S.C. 867(d), provides that the Court of Military Appeals has the authority to limit its decision in any case to less than all of the questions presented by an appellant. Because petitioner did not raise this claim in the Court of Military Appeals, it is not clear that that court rendered a "decision" on the question presented to this Court in the petition for certiorari within the meaning of Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1). For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

martial panels). The decisions of that court are consistent with the decision of the only federal court of appeals to consider this question in light of this Court's decision in *Ballew*. *Mendrano* v. *Smith*, 797 F.2d 1538, 1544-1547 (10th Cir. 1986).

3. In any event, there is no merit to petitioner's claim. The statute governing the number of court-martial panel members does not offend the Fifth or Sixth Amendments to the Constitution.

a. Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose on juries in civilian cases. It is well settled, however, that the right to a jury trial guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[9] The Fifth Amendment specifically exempts "cases arising in the land

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[9] See also *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435 (1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Mendrano* v. *Smith*, 797 F.2d 1538, 1544 (10th Cir. 1986); *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961); *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States* v. *Hutchinson*, 17 M.J. 156-157, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984). See *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment). See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a jury composed of at least six persons.

b. Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. at 447. See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action," *Whelchel* v. *McDonald*, 340 U.S.

122, 127 (1950) (citations omitted); see also, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress's authority over national defense and military affairs"), but also because the practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States*, 483 U.S. at 442-445.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 47, App. 961-971 (2d ed. 1920). Section 14, Art. I, provided that at least 13 officers would serve on general courts-martial (*i.e.*, a president and 12 members). 5 J. Continental Cong. 800 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra*, App. 967. In 1782, Congress substantially adopted the English practice for naval courts-martial of detailing five officers to a court-martial in a capital case and three in a noncapital case. 22 J. Continental Cong. 325 (G. Hunt ed. 1914). Four years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at general courts-martial and three officers at regimental courts-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1934); 1 & 2 W. Winthrop, *supra*, at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972). That language was merely advisory to the officer responsible for appointing the members of a court-martial, however, and his decision to select fewer than 13 members was both lawful and conclusive.

Martin v. *Mott*, 25 U.S. (12 Wheat.) 19, 34-35 (1827). See also *Bishop* v. *United States*, 197 U.S. 334, 339-340 (1905); *Mullan* v. *United States*, 140 U.S. 240, 245 (1891) (convening officer's determination that trial by members junior in rank to the accused could not be avoided was proper).

Congress endorsed that practice throughout the nineteenth century and the early part of the twentieth century when revising the Articles of War. 1 & 2 W. Winthrop, *supra*, at 77, 159; American Articles of War of 1806, ch. 20, Art. 64, 2 Stat. 367, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 981-982; American Articles of War of 1874, Art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 992; American Articles of War of 1916, ch. 418, Art. 5, 39 Stat. 651. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members of general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. 816.

In 1984, Congress amended the UCMJ to coincide with proposed changes in the *Manual for Courts-Martial*. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. Concurrently, the President, acting pursuant to his rulemaking authority, promulgated the current version of the *Manual*. In 1985, Congress enacted additional changes to the UCMJ, including the addition of Article 106a, UCMJ, 10 U.S.C. 906a, an espionage statute that authorizes the imposition of capital punishment. That year, the President modified the *Manual* to limit the imposition of the death penalty to those cases in which the court-martial panel members unanimously find the defen-

dant guilty of an offense for which Congress has authorized the death penalty, and then only if the court finds at least one enumerated aggravating factor. Rule 1004, *Manual*; Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.). In so doing, neither Congress nor the President required that a court-martial panel consist of 12 members. In sum, it is clear that the five-member court-martial panel of Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), represents the longstanding and considered judgment of Congress and the President on the proper balance to be struck between the rights of an individual serviceman and the special needs of the armed forces.

That judgment is a reasonable one. Military society is separate and distinct from civilian society. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 300-304 (1983). The essential mission of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). The permissible number of court-martial panel members dates back to 1782 and was chosen in order to minimize interference with the operational readiness of military forces. See Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972). Considerations of operational readiness are no less valid today. Some cases will be tried at small, remote outposts, aboard ships at sea, or in a combat zone in a time of war, where the pool of available panel members is small and when their availability to perform military duties is critical.

To the extent that the five-person provision may favor the prosecution, other aspects of the military justice system favor the defendant more than is typically the case in civilian systems. As a safeguard

against an inaccurate verdict by a court-martial panel, the military courts require the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction substantially differs from, and is more generous to military defendants than, the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether it believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate findings that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[10]

In addition to the more exacting standards of appellate review, the military defendant enjoys greater

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[10] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence, see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957), the military courts have read that standard into the Act. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977).

rights than his civilian counterpart at the pretrial and post-trial stages of the proceedings. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. That procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a). After trial, the convening authority receives a report of the trial, and he may disapprove findings of guilt or reduce the sentence as a matter of clemency or as a prerogative of command. Art. 60, UCMJ, 10 U.S.C. 860. To assist the convening authority, the accused has the right to submit legal arguments and other matters with respect to the findings and sentence. *Ibid.* See generally *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970). In light of these special protections against the risk of inaccurate verdicts in the military justice system, petitioner has not made the "extraordinarily weighty" case necessary to overcome the longstanding congressional judgment that the court-martial system satisfies due process requirements. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).

3. Petitioner argues that the verdict of a five-member court-martial panel is inherently unreliable. Pet. 3-4. To support that claim, petitioner relies on the studies cited in the lead opinion in *Ballew* v. *Georgia*, 435 U.S. 231-243 (opinion of Blackmun, J.), which relied heavily on empirical studies of the group dynamics of civilian juries. There are no comparable studies of the dynamics of court-martial

panels, however, and the studies of the dynamics of civilian juries cannot automatically be applied to the military justice system. The reason is that the data underlying those studies were compiled in the civilian community from juries that are randomly selected to represent a cross-section of the community. Court-martial panels, however, are not selected in that manner. Instead, under Article 25 of the UCMJ, 10 U.S.C. 825, they are deliberately chosen on the basis of who is best qualified to sit as a panel member. The data and studies discussed in *Ballew* are therefore inapposite to trials by court-martial. *United States* v. *Guilford*, 8 M.J. 598, 601-602 & n.4 (A.C.M.R. 1979), petition for review denied, 8 M.J. 242 (C.M.A. 1980); *United States* v. *Wolff*, 5 M.J. 923, 925 (N.C.M.R. 1978), petition for review denied, 6 M.J. 305 (C.M.A. 1979) (and authorities cited therein). Given the special deference due to Congress's judgments in this area, the question whether studies of the type discussed in *Ballew* justify a change in the UCMJ should be left to Congress.

4. Petitioner suggests that this Court's 1987 decision in *Solorio* v. *United States*, *supra*, requires a different result. He argues that the number of panel members may have been permissible before *Solorio*, but is no longer justified now that this Court has eliminated the service-connection restriction on court-martial jurisdiction. That argument is misdirected.

Solorio did not abolish the service-connection requirement for court-martial jurisdiction. Rather, it reaffirmed the traditional principle that an offense is sufficiently service connected for the purpose of court-martial jurisdiction if the accused is a servicemember when the offense is committed and the trial is held. *Solorio* simply restored court-martial jurisdiction to

a category of cases excluded from coverage during the 18 years following *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), *i.e.*, certain cases in which the offenses were committed by servicemembers off the premises of military installations. The statutory requirements for the number of court-martial members were adopted by Congress prior to this Court's decision in *O'Callahan*, not during the period between *O'Callahan* and *Solorio*. Moreover, there is no historical or logical relationship between the sort of service-connection restriction applied in *O'Callahan* and the statute at issue here. Accordingly, the decision in *Solorio* has no effect on the validity of Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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